No. 10349

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATED INDEMNITY CORPORATION,
a corporation, *Appellant,*

vs.

LAWRENCE P. BUNNEY, as Guardian of
WILMER BUNNEY, a minor, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

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APPELLEE'S STATEMENT OF THE CASE

Page two of Appellee's brief quotes from Rem. Rev. Stat. §6382-16. We merely wish to point out that in that very quotation from the statute it is clear that it is for "the reasonable *protection of the public* against damage and injury for which such carrier may be liable by reason of the *operation* of any motor vehicle," and in the second paragraph quoted, "the department shall give due consideration to the *character* and amount of *traffic* and the *number of persons* affected and the *degree of danger which the proposed operation involves.*"

This argues better than we could state it that the

object of the statute was to protect the general public on the *streets and highways* from the "Operation" of the trucks. Changing the body from a truck that had been removed from that service could in no sense be considered under the permit or statute.

The transferring of the bodies may just as well have taken place in a garage as in a "stub street, a dirt street, right adjoining the Bunney's home" (Opening statement of Appellee's counsel, Tr. 147). If it had happened in a garage, would it be contended that it was under the Permit?

AUTOMATIC COVERAGE PROVISION

Appellee insists that the insurance did not pass to the newly acquired truck because it had not yet had the body placed thereon. They were in one of the acts of placing the body thereon when the accident occurred. They were using the 1938 truck at the time in that very act. Witness the following from Tr. 37 and 38, Court's Pre-trial Certificate:

> "Thereupon David Bunney got the 1938 chassis and cab, called the 1938 truck, and hitched on to the other truck and attempted to pull the vehicle out, by means of a physical connection between the two trucks."

The 1935 truck had been taken out of service as has been pointed out in our opening brief, sold and the title transferred to Pound Motor Co., yet appellee insists that it was still in the service of the W.P.A.

Appellee cites the case of *Mitcham v. Travellers Ind. Co.* (C.C.A. 4) 127 F.(2d) 27, on page 11 of his brief. Inasmuch as we cited and quoted from that case we will not allude to it again. A careful reading

of the case itself will determine which side the case supports.

Appellee cites the case of *Thompson v. State Auto Mutual Insurance Co.* (W. Va.) 11 S.E.(2d) 849, on page 12 of his brief.

This case is easily distinguishable on the facts from the case at bar. In that case the only trucks covered by the insurance policy were 6 tank trucks under "Fleet Coverage," used in hauling gasoline from oil wells. The defendant Thompson had other trucks which he used in general hauling.

At the time he purchased the truck in question it had the *regular truck body* and was used in general hauling with no intention of putting it to tank use or replacing a tank truck. He purchased it in December 30, 1937, and obtained a license January 7, 1938, and used it in general hauling until March 5th, 1938. On that date one of the tank trucks was so badly damaged that it was destroyed and the tank taken therefrom and put on the truck in question, it was then placed in the gasoline haulage to replace the destroyed automobile. The insurance policy *expressly stated* that *all* the *trucks* have *tank bodies.*

The court held that this truck never replaced the tank truck until it was taken from general hauling and placed in use to replace the destroyed tank truck.

How different this is from the case at bar. The 1938 truck was purchased particularly to replace the 1935 truck. Witness the following quoted from Appellee's opening statement (Tr. 145):

> "(By MR. WELTS): David Bunney was doing this hauling with his truck, and wanted a better

> truck necessary to do that hauling, and he negotiated with a local company there known as Pound Motor Company, after he had been notified by the W.P.A. authorities to have his equipment inspected for continued work on that job. So, to get a newer vehicle to use, along the latter part of December, 1939, and first part of January, 1940, he was negotiating with Pound Motor Company of Mt. Vernon for a 1938 Ford Chassis and Cab. * * *"

There is no contention in this case that this 1938 truck was not bought to replace the 1935 truck.

In the *Thompson* case the truck purchased could not replace the tank truck for no premium had been paid for any insurance upon it, and as has been pointed out in previous cases cited the automatic coverage provision in the policy is used so that there will be only one truck covered by one premium, for "the insurance shall automatically terminate upon the replaced automobile at the time of such delivery." *Aetna Casualty & Surety Co. v. Chapman* (Ala.) 6 Div. 768, 200 So. 425.

Here in our case the intent was to replace the 1935 truck immediately with the 1938 truck and in the *Thompson* case there never was such intention until one of the tank trucks was suddenly destroyed two months later.

On pages 16, 17 and 18 of the answering brief, Appellee quotes from the Public Service Endorsement and quotes from Blashfield and argues (page 18) that even if Bunney didn't own it that it would be covered any way. Well, if Bunney didn't own it,

Pound Motor Co. did and certainly Bunney wasn't operating it under the Permit.

There is a statement which occurs in Appellee's brief and the statement of the court in the Pre-trial Certificate that the W.P.A. authorities had ordered him to assemble his equipment for inspection (Tr. 37). What was he doing at the time of the accident? He was trying to get the *1938* truck ready for inspection, not the 1935 truck as he was going to take its body off and put it on the 1938 truck. Could anything be more conclusive that the 1935 truck had been taken out of the W.P.A. service and out from under the Permit?

Another case in point is *Maryland Cas. Co. v. Toney* (Va.) 16 S.E.(2d) 340. This case has just come to our attention and is not cited in our opening brief.

In this case the court said (page 343) after quoting the automatic coverage provision of the policy:

> "The policy provides coverage to the owner of the insured automobile whenever he 'acquires ownership of another automobile' and such insurance applies to such other automobile 'as of the date of its delivery to him.' The insured is afforded protection from the earliest time he needs protection—that is, from the time the new car is delivered to him. Protection is not delayed until ownership is complete in the insured or until the title is registered in his name, or *even until the newly acquired car is placed in service.* From the time of the delivery of the car to the insured—that is from the date he takes possession of it—he is protected by the policy. * * * 'Under clause (3) the insurance afforded by this

policy automatically terminates upon the replaced automobile at the date of such delivery.' This provision is likewise for the benefit of the insurer and is inserted in order that it may not be held liable for risk incurred by operation of the old car after coverage has applied to the newly acquired car. * * * It will be observed that the *date of delivery* of the newly acquired car is the pivotal date in each of these clauses. The insurance attaches to the newly acquired automobile, 'as of the date of its *delivery*' to the insured and automatically *terminates* upon the old car 'at the date of such delivery' provided the insurer notifies the company within 10 days following 'the date of delivery of such other automobile' to him.

"It is true that the policy limits the coverage of the newly acquired car to one which 'replaces' the automobile described in the policy. But as we have seen, the purpose of this latter clause is to limit the coverage on the newly acquired car to the 'use stated in this policy' in order that the risk assumed on the new car may be the same as that carried on the old car, * * *.' Can it be doubted that if Kelley had had an accident on January 31st while returning from Roanoke to Clifton Forge with the newly acquired Dodge car, and had notified the Insurance Company thereof within the prescribed 10 days he would have been protected under the policy? We think not."

The case goes on and distinguishes the *Thompson* case saying, page 344:

"Moreover until the date of substitution, *all* of the trucks mentioned in the policy were in actual use and remained covered by the insurance. Hence coverage under the policy did not attach to the new truck until the day of the substitution."

This case (the *Toney* case) says:

> "The rights of Toney, the judgment creditor, under the policy, can, of course, rise no higher than those of Kelley, the insured. If Kelley is protected by the policy, then the judgment creditor is entitled to recover of the insurance company. If, on the other hand Kelley, the insured, has no claim against the insurance company, his judgment creditor has none."

OPERATION UNDER PERMIT

We have answered somewhat appellee's argument in the previous few pages.

Appellee states on page 18 of his brief:

> "While counsel states baldly that Bunney was not operating under the public service permit, the assumption is not founded in fact. The certificate of Judge Neterer, certifying facts determined by him at the Pre-Trial Conference, covered this situation."

Appellee is mistaken. A pre-trial conference is held to see what the parties can agree on and eliminate the necessity of bringing witnesses to testify to non-disputed facts. In the Pre-Trial Certificate cited by appellee is the following (Tr. 36):

> "Attorneys for the defense do not admit that the permit was in effect at the time of the injury."

Consequently the court did *not* find that the 1935 truck was under the permit at the time of the accident.

The United States Circuit Court of Appeals, 10th Circuit, in the case of *Foster v. Commercial Stan. In-*

surance Co. (1941) 121 F.(2d) 117, in affirming *Commercial Stan. Insurance Co. v. Foster*, 155 Kan. 837, 130 P.(2d) 621, held with our contention that the permit merely covered the operation of the truck under the permit and not the personal business of the insured. In that case the insured drove off his regular route on some business of his own. Could the switching of the bodies of these two trucks be a W.P.A. project? As well urge that the selling of the 1935 truck and the purchase of the 1938 truck was a W.P.A. project.

EMPLOYEE EXCLUSION

On page 23 of his brief Appellee cites *Braley Motor Co. v. Northwest Casualty Co.*, 184 Wash. 47, 49 P.(2d) 911.

This was a case where a person who was working on a commission basis volunteered to drive a truck part way on the trip. He wasn't ordered to do it. The court said in part, "Kantonen, admittedly was not an employee of the Braley Motor Co. etc."

Next cited is *Sills v. Sorenson*, 192 Wash. 318, 73 P.(2d) 798. This was an argument over the guest statute in an automobile accident. They held that Sills was an independent contractor, because the manner of doing the particular work was left entirely up to Sills. In the case at bar, Wilmer Bunney was told every detail of the work to be performed and how to do it.

The other cases cited from other jurisdictions can be easily distinguished on the facts.

DELAYED NOTICE

We believe we have covered this fully in our opening brief.

TRANSFER OF INTEREST IN VEHICLE

Appellee's only answer to our citation of *Continental Insurance Co. v. Michaels*, 13 S.W.(2d) 465, is that it was a fire case. That might be but the law is the same for a spotted horse as for a white one. However, it was an automobile case and the law would have been the same if the car had been in an accident instead of burning up.

We cited *Farmers & Merchants Insurance Co. v. Jensen*, 76 N.W. 577. Appellee points out that the case was decided in 1898! If it is not still the law appellee should show where it had been overruled. If there is a limitation on the validity of a decision we have not heard of it. Appellee goes on to say: "It merely held that the insurance terminated when the owner conveyed the premises by warranty deed." Yes, that is right, the court "merely held" that a change in the ownership of the property voided the insurance.

We cited *Keneagh v. Baker*, 284 S.W. 321.

Appellee says, page 35, that the court held that it would be "preposterous" to hold that the bonding company should be responsible after title had been transferred from one person to another. We agree with this. This is what we contended in our brief. But he does not answer to the force of that citation.

CONCLUSION

Owing to the shortness of time at our disposal we shall not address ourselves to the other arguments of appellee. A careful reading of the cases will, in the last analysis, be the best argument that can be made for either side. With that we rest our case.

We earnestly submit that the judgment of the court below be reversed as asked in our opening brief.

Respectfully submitted,

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